

NOTICE

*This is a summary disposition issued under Alaska Appellate Rule 214(b). Summary disposition decisions of this Court do not create legal precedent and are not available in a publicly accessible electronic database. See Alaska Appellate Rule 214(d).*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

PATRICK LEO SHORTY,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12449  
Trial Court No. 3AN-09-11007 CI

SUMMARY DISPOSITION

No. 0018 — April 10, 2019

Appeal from the Superior Court, Third Judicial District,  
Anchorage, Michael L. Wolverton, Judge.

Appearances: Carolyn Perkins, Attorney at Law, Salt Lake City,  
Utah, under contract with the Office of Public Advocacy,  
Anchorage, for the Appellant. Michal Stryszak, Assistant  
Attorney General, Office of Criminal Appeals, Anchorage, and  
Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Wollenberg, Judge, and Joannides and E. Smith, Senior  
Superior Court Judges.\*

Patrick Leo Shorty appeals the denial of his application for post-conviction relief. Shorty argues that the superior court erred when it found that Shorty failed to

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\* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

prove that his trial attorney had been ineffective. We conclude that there was no error, and we therefore affirm the superior court's decision.

In his underlying criminal case, Shorty was convicted of first-degree sexual assault and several misdemeanor charges. We set out the basic facts of Shorty's case in our decision in Shorty's direct appeal.<sup>1</sup>

On July 8, 2003, a young woman, B.A., encountered three men at the Anchorage Transit Center. After a brief conversation, the four began walking together. As they walked through a vacant field, one of the men tripped B.A. and took her backpack. A younger man then held B.A. down while an older man sexually assaulted her and repeatedly punched her in the face. The younger man sexually assaulted B.A. after the older man had finished. The third man then alerted his companions that the police were nearby, and the three men quickly fled on foot. Shortly afterward, B.A. ran to a nearby patrol car and flagged down Officer Leonard Torres for help.

Officer Torres saw three men running from the scene. Chasing them down, Torres apprehended Thomas Leichty, whom B.A. identified as one of the three men who was present during the assaults. Leichty later told another officer that he could not remember his role in the assault because he was intoxicated. However, Leichty did recall that his friend — a man he knew as "Shorty" — had sexually assaulted B.A. Leichty also mentioned that he had been in prison with Shorty; using this information, officers were able to get the name of Patrick Leo Shorty.

After obtaining DNA samples from both Shorty and Leichty, the police compared the samples to a DNA swab taken from B.A. The results showed that Shorty was almost certainly the source of the sperm sample contained in the swab from B.A.

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<sup>1</sup> *Shorty v. State*, 214 P.3d 374, 377-79 (Alaska App. 2009).

Shorty and Leichty were tried together, but they filed separate appeals. Later, in 2009, both men filed separate applications for post-conviction relief, primarily alleging that each of them received ineffective assistance from their trial attorneys. The two applications were litigated together, and there was a joint evidentiary hearing. After the hearing, Superior Court Judge Michael L. Wolverton issued separate orders. The judge denied both applications, concluding that neither Shorty nor Leichty had shown that his trial attorney was incompetent. Each then filed a separate appeal.

On appeal, Shorty raises only one claim: he asserts that his trial attorney should have made greater pretrial efforts to determine if B.A. had bipolar disorder, and if she had used drugs on the day of the assault. Shorty claims that evidence of an untreated bipolar disorder and drug abuse would have greatly bolstered the attorney's defense theory — *i.e.*, that B.A. had consented to sexual intercourse with Shorty.

An applicant alleging ineffective assistance of counsel must demonstrate that his attorney failed to “perform at least as well as a lawyer with ordinary training and skill in the criminal law.”<sup>2</sup> The law presumes that an attorney has acted competently, and that the attorney's decisions were prompted by sound tactical considerations.<sup>3</sup> To prevail in a post-conviction relief action based on an ineffective assistance of counsel claim, the defendant must rebut this presumption.<sup>4</sup> This presumption of competence applies equally to cases where it is claimed that trial counsel failed to conduct an adequate pretrial investigation.<sup>5</sup>

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<sup>2</sup> *State v. Jones*, 759 P.2d 558, 567 (Alaska App. 1988).

<sup>3</sup> *Id.* at 569.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

At the evidentiary hearing in the present case, Shorty's trial attorney said that, prior to trial, all she had was a report from her investigator indicating that B.A.'s mother or someone else had thought that B.A. was bipolar. The trial attorney testified that because she never saw any psychiatric or other medical evidence that B.A. had been diagnosed as bipolar, she decided that following up on a possible history of bipolar disorder was not necessary to Shorty's defense. We note that at this same hearing, Leichty's trial attorney testified that prior to the criminal trial, the defense had received a copy of B.A.'s Providence Behavioral Health records, and that these records did not contain a bipolar diagnosis. Shorty's trial attorney was not directly questioned about the Providence records.

In the post-conviction relief proceeding, Shorty provided no evidence that B.A. had ever been medically or otherwise professionally diagnosed with bipolar disorder. Shorty also produced no evidence that, on the day B.A. was assaulted, she was using any drugs at all. In other words, Shorty was unable to establish the existence of the evidence that he alleged his attorney should have investigated prior to his criminal trial.

Based on this lack of evidence, the superior court denied Shorty's application. The court found that it was reasonable for Shorty's trial attorney to decide to limit her investigation of these issues because there was no evidence that B.A. had ever been medically diagnosed as bipolar, or that she had used drugs on the day of the assault.

We agree with the superior court that Shorty's trial attorney's decisions on these issues were not incompetent. Accordingly, we AFFIRM the judgment of the superior court.